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IN THE

Supreme Court of the United States

October Term, 1963.

No. 261.

ESTATE OF WINFRED S. HURST, Deceased:

HARRY J. ALKER, JR.,

Petitioner.

Sur Petition for Allowance of Writ of Certiorari to the Supreme Court of Pennsylvania and the Orphans' Court of Montgomery County, Pennsylvania.

PETITIONER'S REPLY BRIEF TO "BRIEF FOR RESPONDENTS IN OPPOSITION," AND "MEMORANDUM FOR THE UNITED STATES IN OPPOSITION."

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ARGUMENT.

ESTATE TAX PENALTY IS INVALID.

As to Respondents' Brief.

Despite the respondents' attempt to justify their agreed Stipulation for "half a penalty" in the Courts below, and here, *petitioner reiterates* with all possible emphasis that there is no warrant in law for the imposition of the alleged "fraud penalty" on estate tax returns. Respondents, in footnote #2, at bottom of page 6, on their "Argument" in Brief in Opposition, say:

"2. Petitioner also asserts (Petition, pp. 8, 15-20), that the initial imposition of the civil penalty by Internal Revenue was unauthorized by statute, but this assertion is patently erroneous. Putting aside the question whether this issue is properly raised in this case, Section 894(a) of the 1939 Internal Revenue Code, pertaining to estate tax, which petitioner has not cited to this Court, provides:

> "' * * * False or Fraudulent Return.—For 50 per centum addition to the tax in case of a false or fraudulent return, see Section 3612(d)(2)'.

"Section 3612(d)(2) of the same code provides:

> '(d) Additions to Tax.—
>
> "'(2) Fraud.—In case a false or fraudulent return or list is willfully made, the Commissioner shall add to the tax 50 per centum of its amount * * *'."

Respondents' said quotation shows on its face that respondents *were, and still are, grossly in error* because the very language they cite as authority is ineffectual to impose; and does *not* impose, a "fraud penalty" of 50% of the tax or any other amount, for improper estate tax returns. The most that can be said for Section 894 of the 1939 Internal Revenue Code is that it makes a weak reference to Section 3612(d)(2) in that connection. Section 894, itself, imposes no penalty whatever for "fraud, or otherwise" on estate tax returns. And, as we have clearly shown in our original Brief herein, Section 3612(d)(2), by its very context and juxtapositions, *applies only to excise taxes* on goods, wares, and merchandise. The latter section makes no mention whatever of "fraud penalties" against estate tax returns.

Consequently, it is quite obvious to anyone, as it should have been to Respondents, that the attempted "incorporation by reference" of Section 894 was, and still is, wholly

abortive. Nothing is more certain in our Anglo-American law, both State and Federal, than the truisms that:

> "*Penalties* are never extended by implication. They *must be expressly imposed*, or *they cannot be enforced*."
>
> *Ellicott v. E. Penna. R. Co.*, 99 U. S. 573; 25 L. Ed. 292; and further that:

"A statute condemning goods for *fraud upon the revenue laws* is a *penal law*, and should be *strictly construed*." (Emphasis ours.)

> *U. S. v. 84 Boxes of Sugar*, 7 Peters 453; 8 L. Ed. 745.

Neither Section #894, nor Section #3612(d)(2), make any specific impositon of a "fraud penalty" on improper estate tax returns. And to be effective as a lawful penalty of any kind, such particularity is absolutely essential somewhere in the statute. There can *never be any valid penalty* for anything unless the statute specifically so asserts. (See *Cronin's Estate v. Comm.*, 164 F. 2d 566):

> "The provisions of statutes *levying taxes* will *not* be extended by implication beyond the *clear import* of the *language used*, nor their operations enlarged so as to embrace matters *not specifically pointed out*."
>
> *Gould v. Gould*, 245 U. S. 151, 62 L. Ed. 211;
> *Hecht v. Malley*, 265 U. S. 144, 68 L. Ed. 949.

This is, and always has been, the law in America. It is so axiomatic, so basic, and so long established that it is well-nigh impossible for the Respondents to have been unaware of it. Yet, their unwarranted and unlawful Stipulation for a "fraud penalty" in the U. S. Tax Court gives every evidence that they deliberately, or with *crass and culpable negligence*, agreed by Stipulation for imposition

of an *illegal* $28,000 "penalty" which, admittedly, they then intended to enforce by proration against this petitioner.

> "*No one can be punished* for a violation of a statute *unless* his case is *plainly and unmistakably within its terms.*" (Emphasis ours.)
>
> *U. S. v. Lacher*, 134 U. S. 624; 33 L. Ed. 1080;
> *U. S. v. Northern P. R. Co.*, 242 U. S. 190; 61 L. Ed. 240.

> "Statutes levying taxes are—construed most strongly against the government, and in favor of the citizen."
>
> *Gould v. Gould*, 245 U. S. 151; 62 L. Ed. 211;
> *Phila. v. Broomall*, 183 Pa. Super. 296 (1957); 130 A. 2d 713.

> "Whatever doubts exist in a tax measure must be resolved against the Government."
>
> *Schwan v. Doyle*, 258 U. S. 529; 66 L. Ed. 747;
> *U. S. v. Updike*, 281 U. S. 489; 74 L. Ed. 984;
> *Comm. v. Allied Bldg. Credits*, 385 Pa. 370 (1956), 123 A. 2d 686.

These salutary principles of law are embodied in the Uniform Statutory Construction Act adopted in Pennsylvania May 28, 1937, P. L. 1019 (46 P. S. 558), art. IV, Sec. 58:

> "*All provisions of a law* of the classes hereafter enumerated shall be strictly construed;
>
> (1) Penal provisions;
>
> . . . .
>
> (3) Provisions imposing taxes;—."

These stringent rules are not merely invoked by that comparatively modern statute; *Appeal of Schl. Dist. of Allentown*, 370 Pa. 161 (1952), 87 A. 2d 480; they are as ancient and as incontestable as the common law, itself: *Gallagher v. Neal*, 3 P. & W. 183; *Cake v. Jacoby*, 3 W. N. C.

391. Hence the respondents' disregard thereof by failing to assert such irrefutable defences in the U. S. Tax Court against the alleged "fraud penalty", so erroneously claimed therein, is so utterly inexcusable as to warrant a complete surcharge against them for the full amount of the $28,000 "half penalty" so recklessly paid by them.

What is the answer to this gross negligence by respondents? It is nothing more than repetitive character assassinations of the petitioner (Respondents' Brief, pp. 3 & 4)—a smear campaign, as is all *argumentum ad hominen*. And this, despite the fact that they know, or ought to know after all these years, that witness, Carpenter, an old employee of decedent, Winfred Hurst, exonerated this petitioner by testifying in Norristown, Pa., that said decedent, shortly before his death, stated that said $35,000 did not belong to him (decedent) but was the property of one Rothman, and that he, Carpenter, had personally delivered said $35,000 in cash, to said Rothman. Thus, petitioner's innocence of that false charge was completely established and the miscarriage of justice on his improper conviction was properly rectified.

Nonetheless, respondents continue to drag the same old "red herring" into this case in the hope that their crass incompetence and gross neglect may be overlooked, or excused by this Honorable Supreme Court. For similar reasons, they likewise inject the wholly irrelevant comments regarding petitioner's income tax difficulties which have nothing whatever to do with this case or any questions here involved. They also refer to his removal (p. 2), which our Brief (p. 5) properly explained. Why do they thus build up their Brief? The obvious reason can only be: "If you can't deny and refute the allegation, then you must defy and malign the alleger." Respondents doubtless feel that they simply had to do something to avoid the consequences of their incompetent mishandling of the claim in the United States Tax Court, their crass ignorance of available defenses there, and their utter neglect to assert the legal bars clearly precluding any penalty whatever in that

tribunal. And so, again and again, they continue here, as they have heretofore, to impugn the petitioner personally.

It should be abundantly clear, therefore, that the alleged "incorporation by reference" from Section #894 to Section #3612(d)(2), which is *a crucial Federal legal question of prime importance on a nation-wide scale*, does not in fact incorporate anything by reference. Section #894 I. R. Code, 1939, is nothing more than a footnote directing attention to an alleged "fraud penalty" in Section #3612(d)(2) dealing only with excise taxes on merchandise. Neither of these sections (so cited by respondents) imposes a fraud penalty for improper estate tax returns, *ipsissimis verbis* and with exactitude, as all penalty laws must do with particularity to be enforcible at all against anybody.

As to "Brief of United States in Opposition."

Lack of Due Process Admitted Both by Respondents and by United States.

The United States, through the Solicitor General, et al., has filed herein a Brief in Opposition. Like the Respondents, themselves, the United States has unwittingly *conceded the utter lack of Due Process* in this proceeding. On page 5 of their Brief, the United States says:

> "1. Joint and *several liability* for the estate tax *is imposed* by statute upon the estate itself, executors, administrators or other persons in control—*and distributees of the estate*. Internal Revenue Code of 1939, Sections 822(b), 826-827. (Internal Revenue Code of 1954, Sections 2002, 6324(a).) See Lowndes-Kramer, 'Federal Estate and Gift Taxes' (2nd Ed.), Section 21.20. The *Government is entitled to collect* the tax, *from any one of these persons alone*, without joinder of the others (Phillips v. Commissioner, 283 U. S. 589).
> * * * *"

The *petitioner*, Alker, although he withdrew as Executor in favor of respondents, as administrators d.b.n., c.t.a., *was still a one-eighth* residuary legatee and *distributee* under the Will. Thus, pursuant to the above-quoted admission by the United States, *petitioner was subjected to a possible legal liability by law* and, as such, *was continually liable to amercement* thereunder. Despite the constant threat of such penal liability, the United States says (p. 5):

> "—Alker was therefore not a necessary party to the Tax Court case."

And the Respondents erroneously conclude (page 24):

> "Alker,—neither had a right to participate as a party in the Tax Court, (see Rule 6 of the Rules of Practice of the Tax Court), nor a right to intervene. The Tax Court has no rules of intervention."

These gratuitous and self-serving errors by the Respondents and the United States are both glaring "non sequitur." The U. S. Tax Court is a c rt of record, and every court of record, whether common law, constitutional, or statutory in origin (unless specifically precluded by law), has the inherent right, under general principles of equity and justice, to permit intervention by any party liable to be affected by its judgment, and must accord notice and opportunity to be heard to any person whose property may be taken by its judgments or executions thereunder. These are requisites to the validity of any judicial determination by any tribunal anywhere in America. And their absence or denial is a violation of Due Process of Law under our U. S. Constitution. The mere neglect of specific rules to provide for such interventions is an immaterial oversight. The Respondents' failure fully to inform the U. S. Tax Court, and their purposive refusal to give this petitioner timely notice and an opportunity to be heard therein, even if the penalty were otherwise valid (which, as we have

shown, it is not), renders their stipulated penalty-judgment *void ab initio* as to petitioner, Alker, and vitiates Respondents' right to mulct the Petitioner in the courts below for any amount in any proceeding.

To prevent similar illegal injustices to many thousands of like-situated distributees throughout our Nation, Petitioner respectfully urges that it is well-nigh imperative for your honorable Supreme Court to grant Certiorari in this case.

It is further submitted that when the administrator d.b.n.c.t.a. replaced Alker, it acted as a release of any liability to the estate for any estate tax liability by Alker as executor.

The Stipulated Penalty Was Unlawful.

As Petitioner has shown in his original Brief (supporting petition) Section 3612(d)(2), by its very origin in 1864 (a half century before estate taxes were ever dreamed in the Congressional mind), by its context, and by the juxtapositions of its accompanying sections, has never been applicable to anything but *excise taxes on goods, wares, and merchandise.* None of its provisions was ever enlarged by any language whatever to include estate taxes and penalties. Moreover, *Section 894(a)* of the I. R. Code, 1939, contrary to Respondents' unsupported, unverified, and dogmatic "ipsedixitisms" *is not*, even by the widest stretch of their own imaginations, a competent *incorporation by reference.* The United States, in its Brief (page 6) has added to this confusion by similarly citing Sections #821(e) and #894(a) of the 1939 I. R. Code. But even a superficial examination of Section #821(e) conclusively shows that it, too, is *merely another bald reference* to Section 3612, wholly *devoid of any incorporation* therein and without any words whatever therein added to impose any penalties of any kind in any amount upon anyone. Penalty-muleting by imagination is alien to our Anglo-American law. Such impositions against our citizens can be enacted

only by Congressional words that are clear, precise, and indubitable in regard to the persons, places, things, acts or omissions requisite for the specific amercements intended. Guesswork is as foreign to our fundamental concepts as is the "presumption of guilt" in alien juridical systems.

The only penalty that might ever have been validly entered against this *Hurst Estate*, or against any of its residuary legatees, as distributees thereof, is that encompassed by Section #871(i) of the U. S. I. R. Code, namely: a fraud penalty of *fifty per centum (50%) of the deficiency*—not 50% of the total tax, or any part thereof. This was noted and fully covered in Petitioner's original petition, citing the case of *Estate of Harry Stoll Leyman, deceased v. Commissioner*, 40 T. C. — No. 15 — 4/24/63. But, in this *Hurst Estate* in the U. S. Tax Court there was, and is, a specific finding of fact that "no deficiency in the Estate tax exists or is due." It follows, therefore, that no valid penalty of any kind in any amount could properly be found due, adjudged or entered against *Hurst's Estate*, its executor, administrators, or distributees. Hence the $28,180.78 "half-penalty" so stipulated by Respondents, was *null and void* as a "*functus officio*", and the proration judgment of the courts below, resting entirely thereon, is likewise vitiated by the same illegality. See *Cronin's Estate v. Commissioner*, 164 F. 2d 566 (13 and 14).

Furthermore, the record irrefutably shows that Certificate No. 24 of the Dublin Hosiery Company's stock was delivered to the Petitioner, Alker, and by him, in turn, entrusted to three (3) persons appointed by Petitioner in writing to act as his escrow agents. Thus, they were merely "stakeholders" of said stock as Alker's representatives, and the maxim "qui facit per alium, facit per se" applies so that ownership remained always in the Petitioner, Alker. It is fundamental law that an agent can never contest, deny or impugn his principal's title to the subject-matter of his agency.

The legal questions thereby raised in this case, despite respondents' pleas to minimize them, are of vital national importance.

Unless this honorable Supreme Court grant certiorari here to review the erroneous decisions below, the United States Internal Revenue Service will continue its unlawful practice of trying to collect "fraud penalties" of 50% of the tax in many hundreds of estate tax returns throughout America whenever these tax-gathers can superficially allege an improper return. And to justify such form of "extortion", they will gleefully cite this case.

For these, and all other reasons previously argued, petitioner courteously urges that Writ of Certiorari should be granted not only to achieve equity for this applicant but also to prevent the wholesale mulcting of other Federal taxpayers by the collection of illegal "fraud penalties."

Respectfully submitted,

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